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No. 96-1830

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

TRACTOR SUPPLY COMPANY, INC.
Petitioner,
v.
VINCENT L. PRYNER,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

The decisions below, statutes involved, and jurisdiction are accurately stated in the Petition for Writ of Certiorari (at 1-2).

STATEMENT OF THE CASE

1. Facts. Vincent Pryner worked in a warehouse as an employee of Tractor Supply Company ("Tractor" or "the employer") from September 13, 1985 until his termination on February 22, 1996. Appendix to Petition for Writ of Certiorari ("Pet. App.") at 29. Prior to his discharge, Mr. Pryner was covered by a collective bargaining agreement ("CBA") entered into by Tractor and his union, the Chauffeurs, Teamsters, Warehousemen and Helpers Local Union No. 135. *Id.* That collective bargaining agreement prohibits Tractor from discharging any covered employee without "just cause," and contains a provision prohibiting Tractor and Mr. Pryner's union from

discriminating against any employee on the basis of race, color, religion, national origin, sex or age. The CBA also contains in Section 3 a separate provision recognizing Tractor's obligations under the Americans With Disabilities Act ("ADA"), which expressly permits the company unilaterally to "make a reasonable accommodation notwithstanding the requirements of this Agreement" Tractor deems necessary to comply with the ADA or the regulations promulgated thereunder. Pet. App. 30-31. Nothing in the agreement purports to incorporate as a contractual term an enforceable obligation to comply with *external* employment discrimination laws.

Additionally, the CBA establishes a grievance/arbitration procedure. That agreement provides, in Article 12, Section 1, for a three-step grievance process for the resolution of any disputes "involving interpretation or application of the provisions" of the agreement. Appendix to Brief in Opposition ("App.") at 1a. The agreement provides further that "[i]f the decision of the Company in Step 3 is unsatisfactory to the Union, and the Union wishes to process the grievance further," the union, but *not* any individual employee, has the right to take the matter to arbitration. Art. 12 §§ 3, 8, App. 2a, 4a. And the agreement goes on to state several times that arbitration under the CBA is limited to issues arising under the contract itself.

In September 1994, Mr. Pryner was informed that he was discharged from his employment because he had failed to provide adequate documentation regarding a disability leave of absence, Mr. Pryner filed a grievance under the CBA, the union processed the grievance and eventually demanded arbitration. In August 1995, and after a two-day hearing, the arbitrator found that Tractor did not have "just cause" for terminating Mr. Pryner's employment, and ordered that he be reinstated with back pay. Thereafter, when Tractor first suspended and then, for a

second time, fired him, Mr. Pryner filed additional grievances, on which arbitration is pending.

2. Proceedings. Mr. Pryner filed a complaint against Tractor on February 17, 1995, which was amended on July 12, 1995 and again on May 31, 1996. Pet. App. 31. The complaint alleges that Mr. Pryner was subject to racial harassment and retaliation, and was suspended and discharged from his employment on the basis of his race, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* The complaint also alleges that Mr. Pryner was suspended and discharged on the basis of his disability, in violation of the ADA, 42 U.S.C. § 12101 *et seq.* Pet. App. 31.

Tractor moved for summary judgment, or, in the alternative, a stay of the instant action pending arbitration of Mr. Pryner's still-pending grievances, on the ground that the arbitration provisions of the collective bargaining agreement divested the district court of subject matter jurisdiction. Pet. App. 31-32. The district court denied both motions, holding that under this Court's decision in *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974), reaffirmed in all essential respects in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) and *Livadas v. Bradshaw*, 114 S.Ct. 2068, 2080 n.21 (1994), the arbitration provisions of the collective bargaining agreement could not preclude Mr. Pryner from bringing his statutory anti-discrimination claims. Pet. App. 34-43.

Tractor took an interlocutory appeal to the United States Court of Appeals for the Seventh Circuit, claiming the appeal was proper under § 16 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 16. In its opinion, issued March 20, 1997, and authored by Judge Posner, the Seventh Circuit concluded that the FAA applies to disputes such as this under a collective bargaining agreement, and thus supplied the appeals court with jurisdiction over the interlocutory appeal.[1] On the merits, the Seventh

[1] This case was consolidated in the Seventh Circuit with another case raising similar issues but involving a different, and differently

Circuit affirmed the judgment of the district court on the basis of this Court's holding in *Gardner-Denver*.

The Seventh Circuit emphasized that *Gilmer* "certainly cannot be taken to hold that collective bargaining agreements can compel the arbitration of statutory rights." Pet. App. 27. To the contrary, stated the court of appeals, *Gilmer*, by distinguishing *Gardner-Denver*, underscored the proposition that the availability of a grievance/arbitration mechanism under a collective bargaining agreement cannot supplant an individual employee's right to bring his statutory anti-discrimination claim in court. Pet. App. 26. And the Seventh Circuit went on to explain at length why the *Gardner-Denver* rule is the right rule:

> Most important, the grievance and arbitration procedure can be invoked only by the union, and not by the worker. The worker has to persuade the union to prosecute his grievance and if it loses in the early stages of the grievance proceedings to submit the grievance to arbitration. *Vaca v. Sipes*, 386 U.S. 171, 190-91 (1967). . . . [T]he union has broad discretion as to whether or not to prosecute a grievance. It may take into account tactical and strategic factors such as its limited resources and consequent need to establish priorities, just as other 'prosecutors' must do, as well as its desire to maintain harmonious relations among the workers and between them and the employer. [Citations] Corresponding to this expansive and ill-defined discretion, the scope of judicial review of its exercise is deferential. *See e.g. Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 78 (1991) . . . The result is that the worker who asks the union to grieve a statutory violation cannot have great confidence either that it will do so or that if it does not the courts will intervene and force it to do so. [Pet. App. 19-20].

On the basis of these distinctions between individual agreements to arbitrate statutory claims and collective bargain-

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worded, collective bargaining agreement. *Sobierajski v. Thoesen Tractor & Equipment Co.*, Seventh Cir. No. 96-2892. Sobierajski has since been settled, and is not involved in the present proceeding.

ing agreement arbitration of non-discrimination clauses, the Seventh Circuit concluded that foreclosing Mr. Pryner's right to pursue his statutory claims in federal court because of a possible remedy under the "majoritarian" collective bargaining agreement would be "deliver[ing] the enforcement of the rights of . . . minorities into the hands of the majority," a result not "consistent wtih the policy of [employment discrimination] statutes." Pet. App. 21.

Tractor filed its petition for a writ of certiorari on May 15, 1997.

ARGUMENT

The collective bargaining agreement here does *not* provide for the arbitration of statutory claims and this case therefore does *not* present the legal question—on which Tractor seeks *certiorari*—as to the effect of a collective agreement that does so provide on an individual employee's suit asserting a statutory claim.

There is, additionally, a potentially dispositive threshold question which, if decided differently than the Seventh Circuit decided it, would preclude reaching the question presented in Tractor's petition.

And, in any event, the circuit conflict asserted in the petition is likely to resolve itself over time. The Seventh Circuit's ruling is correct based on this Court's cases, and has been adopted by every circuit but one that has definitively decided the question. *Austin v. Owens-Brockway*, 78 F.3d 875 (4th Cir.), *cert. denied*, ——U.S.——, 117 S.Ct. 432 (1996), the lone decision creating the asserted conflict, is becoming increasingly isolated and given time, is likely to be limited to its unusual facts.

The petition for writ of certiorari should therefore be denied.[2]

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[2] We note that the same issue Tractor presents for review in this case was twice last term presented to the Court in petitions for writs of certiorari, both of which were denied. *Austin v. Owens-Brockway, supra*, Docket No. 96-337, *cert. denied*, —— U.S. ——, 117 S.Ct. 432 (1996); *Varner v. National Super Markets, Inc.*,

1. Tractor seeks *certiorari* to decide the following question:

> whether a voluntary agreement to arbitrate federal statutory employment discrimination claims is enforceable under *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), notwithstanding that it is a part of a collective bargaining agreement. [Pet. Cert. I]

This case simply does not raise that question, because the collective bargaining agreement in this case was *not* an "agreement to arbitrate federal statutory employment discrimination claims."

To see why that is true, it is instructive to compare the collective bargaining agreement here with the agreement before the Fourth Circuit in *Austin*. The *Austin* agreement provided:

> Article 38
>
> Fair Employment and Equal Opportunities
>
> 1. The Company and the Union will comply with all laws preventing discrimination against any employee because of race, color, religion, sex, national origin, age, handicap, or veteran status.
>
> 2. This Contract shall be administered in accordance with the applicable provisions of the American with Disabilities Act. Before taking action relative to this Action, the Company will meet with the Local Union, and both parties will have sufficient opportunity to express their opinions regarding an anticipated action.

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94 F.3d 1209 (8th Cir. 1996), No. 96-802, *cert. denied sub nom. National Supermarkets, Inc. v. Varner*, —— U.S. ——, 117 S.Ct. 946 (1997). At the time of both of those denials, as now, there was a conflict in the circuits, with only *Austin* holding that *Gilmer*, rather than *Alexander v. Gardner Denver*, governs in the collective bargaining situation. The only change is that the *Austin* rule has subsequently been rejected by the Seventh and Tenth Circuits.

> 3. Any dispute under this Article as with all other Articles of this Contract shall be subject to the grievance procedure.

Quite understandably, the Fourth Circuit regarded this language as providing in express terms for the submission of all statutory issues concerning the enumerated employment discrimination claims to the grievance/arbitration process, and went on to decide whether that procedural route for the resolution of the covered statutory employment discrimination disputes is mandatory for covered employees.

The collective bargaining agreement governing Mr. Pryner's case, by contrast, does *not* provide for arbitration of Mr. Pryner's statutory claims, and makes this clear in several respects.

First, with respect to discrimination based on "race [or] color", the agreement simply forbids the Company to discriminate on those bases. The agreement makes no reference whatever to external employment discrimination law, and does not purport in any way to incorporate into the agreement an obligation to follow external law. Art. 29, § 3. App. 5a.

The agreement in *Gardner-Denver* contained a similar provision, which prohibited "discrimination against any employee on account of race, color, religion, sex, national origin, or ancestry." 415 U.S. at 39. And *Gardner-Denver* makes clear that a collective bargaining agreement which simply prohibits discrimination in employment on certain bases cannot be read as broadly incorporating all external statutory protections against discrimination:

> In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective bargaining agreement. . . . The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence. [415 U.S. at 49-50.]

Additionally, one of Mr. Pryner's claims arose under the Americans with Disabilities Act. Unlike the agreement in *Austin*, the collective bargaining agreement here does not provide *any* affirmative contractual protection against discrimination based on disability. Article 29, Section 2 does not mention discrimination based on handicap or disability. App. 5a. And Article 29, Section 3, far from incorporating the ADA protections into the agreement, provides that accommodations required by external law "that may be in conflict with provisions of this Agreement" can be made "*notwithstanding* the requirements of this Agreement." (Emphasis supplied). App. 5a. To agree that something may be done "notwithstanding" the agreement although "in conflict" with it is only to preclude a claim of contract violation where the employer complies with external law. To so agree is certainly not to provide any protections enforceable under the agreement itself. With regard to the ADA claim, then, the Tractor-Teamsters collective bargaining agreement does not provide even contractual discrimination protections such as those applicable in *Gardner-Denver*.

Moreover, the collective bargaining agreement governing Mr. Pryner provides emphatically that arbitration under the agreement is limited to contractual questions. Art. 12 §§ 1, 2(A), App. 1a-2a. Arbitration, for example, is limited to grievances "based on an alleged violation by the Company of a specific contract provision or . . . based on the interpretation or application of a specific provision of the contract." Art. 12, § 2, App. 2a. And the arbitration clause of the agreement specifically provides that an arbitrator may not reverse the company's decision "unless it is found that the Company misinterpreted or violated the express terms of the contract." Art. 12, § 2, App. 2a. Finally, the agreement expressly provides that "[t]he arbitrator shall *only interpret the Agreement* and shall not modify, amend, add to or delete from any of its provisions in deciding the issue(s) submitted

to him by the parties." Art. 12 § 7, App. 3a-4a (emphasis supplied).

Similar language is consistently understood in the labor relations world as precluding the arbitration of statutory disputes. *See, e.g., Hawaiian Airlines v. Norris,* 114 S. Ct. 2239 (1994) (holding that the Railway Labor Act, 45 U.S.C. § 158 et seq., which requires the arbitration of "disputes growing out of grievances or out of the interpretation or application" of collective bargaining agreements does not require the arbitration of statutory disputes); *Livadas v. Bradshaw, supra,* 114 S. Ct. at 2071 n.2 (collective bargaining agreement that defines a grievance as a "dispute . . . involving or growing out of the meaning, interpretation, application, or alleged violation" of the agreement does not require the arbitration of issues governed by independent statutory law). In contrast, the collective bargaining agreement considered by the Fourth Circuit in *Austin* explicitly provided for arbitration of the employer's promise to abide by all laws prohibiting specified forms of employment discrimination. 78 F.3d at 879.

The collective bargaining agreement in this case, then, unlike the one in *Austin,* does not permit, much less require, submission of statutory questions to the arbitrator.

The Seventh Circuit identified some of these features of the collective bargaining agreement governing Mr. Pryner. Pet. App. 25.[3] But that court went on to decide the arbitration of statutory claims issue decided in *Austin* anyway, maintaining, quite incorrectly, that *Austin* "[does] not differ in any material particular from the present [case]." Pet. App. 24.[4]

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[3] The difference between the substantive and procedural provisions in the agreements in this case and in *Austin*, and the consequences of those differences under this Court's cases, was argued at length to the Seventh Circuit. Brief and Supplemental Appendix of Plaintiff-Appellee, at 19-32.

[4] It is possible that the Seventh Circuit decided the *Austin* question although that question is not presented by this case because it

The upshot is that, if *certiorari* were granted in this case to decide "whether a voluntary agreement to arbitrate federal statutory employment discrimination claims is enforceable . . . notwithstanding that it is a part of a collective bargaining agreement," the Court would almost certainly never reach the issue on which *certiorari* was granted, because it would discover that there was no such agreement in this case.

The only related issue that *could* be presented in this case is whether a collective bargaining agreement arbitration procedure limited to the adjudication of a *contractual* nondiscrimination clause, with no commitment of statutory issues to the arbitrator, must be exhausted before bringing a case based on a federal statute. If plenary review were granted in this case, that issue could not be reached, because it is not within the question presented. *See* Supreme Court Rules, Rule 14.1(a); *Yee v. City of Escondido*, 503 U.S. 519, 536-37 (1992). And that issue is not certworthy, because there is no circuit conflict on the question, *Gilmer* is entirely irrelevant to it (since the agreement to arbitrate in that case did cover statutory rights), and this Court's pre-*Gilmer* cases hold definitively that because there is a fundamental difference between contract-based rights and rights grounded in a federal statute, a contract-based right to be free of discrimination has no legal effect on employees' federal statutory rights. *Gardner-Denver, supra; Barrentine v. Arkansas Best Freight System*, 450 U.S. 728, 737-38, 744 (1981) ("An arbitrator's power is both derived from, and limited by, the collective bargaining agreement . . . [Where] the arbitartor is required to effectuate the intent of the parties, he may issue a ruling that is inimical to the public policies underlying the [statute], thus depriving an employee of protected statutory rights."); *see also Board of Regents v. Tomanio*, 446 U.S. 478, 490 (1990) ("contractual rights

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was presented by the companion case, *Sobierajski*, now settled. The collective bargaining agreement in *Sobierajski* did refer to external employment discrimination law. Pet. App. 25.

under a collective bargaining agreement and statutory rights have legally independent origins"); *International Union of Electrical Workers v. Robbins & Myers,* 429 U.S. 229, 236, 238 (1976) (declining to toll Title VII statute of limitations during the pendency of contractual grievance proceedings was not asserting the same statutory claim in a different forum, but was asserting an independent claim based on a *contract* right.").

2. There is a second reason this Court would not reach the issue presented in Tractor's petition were review granted: This case presents a potentially dispositive threshold issue, *viz.*, whether the Federal Arbitration Act, the asserted basis for the court of appeal's appellate jurisdiction over the interlocutory appeal from the denial of a stay, applies to disputes arising from collective bargaining agreements.[6] Mr. Pryner is filing a cross-petition requesting that, if this Court grants Tractor's petition for *certiorari* on the merits, the Court also grant *certiorari* on the FAA question. If the Court concludes that the FAA does not apply to such agreements, then the interlocutory appeal to the Seventh Circuit was improper, and this Court will have no merits issue before it to decide.

3. Finally, the asserted circuit conflict is not worthy of this Court's attention because it is likely to work itself out on the basis of the differences between the collective bargaining agreement in *Austin* and those in the other decided federal appellate cases.[6]

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[5] *Austin* did not proceed under the FAA, since under the Fourth Circuit's law, the FAA has no application to collective bargaining agreements. *Austin*, 78 F.3d at 879.

[6] It is worth noting as well that this case in its current posture is merely an appeal from an interlocutory order denying a motion for a stay. Even if the case proceeds to trial and judgment under the Seventh Circuit decision. Tractor could seek review on the same issue it now raises after the trial is over. By the same token, the question on which Tractor seeks certiorari would disappear if Tractor wins a final judgment in its favor after trial. The combina-

Austin is the *only* decided federal appellate case that has adopted petitioner's position on the question it seeks to present to this Court.[7] All the federal appellate cases (and cases by State courts of last resort) addressing whether employees covered by collective bargaining agreements are precluded from asserting federal statutory rights in federal court where there could be a claim on the same facts under the agreement's grievance/arbitration clause have, like the decisions below in this case, held that there is no such preclusion, and that the *Gilmer* lines of cases requiring the arbitration of statutory claims applies to individual contracts of employment only. *Varner v. National Super Markets, Inc., supra*, 94 F.3d at 1209; *Tran v. Tran*, 54 F.3d 115 (2nd Cir. 1995); *Harrison v. Eddy Potash. Inc.*, 112 F.3d 1437 (10th Cir. 1997); *Pike v. Burlington Northern R.R. Co.*, 903 P.2d 1352, 1355-57 (Mon. 1995).[8]

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tion of the interlocutory posture and the fact that the circuit conflict on which Tractor's petition is based may well dissipate while this case goes forward in the lower courts counsel that the Court should not depart from its presumption against granting *certiorari* in cases that have not yet resulted in a final judgment. *See e.g., Virginia Military Inst. v. United States*, 113 S.Ct. 2431 (1993) (Scalia, J., concurring) (citing *American Construction Co. v. Jacksonville, T & K.W.R. Co.*, 148 U.S. 372, 384 (1893); *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R. Co.*, 389 U.S. 327 (1967) (per curiam)).

[7] In an effort to create a broader conflict, the petition relies heavily upon federal district court cases and one intermediate state appellate court case that follow *Austin*. The rules of this Court, however, do not recognize conflicts at those levels as supporting a petition for writ of certiorari (Rule 10), and with good reason: It is the task of the federal courts of appeal and of the highest court of the states, not of this Court, to resolve such decisional disarray within their own jurisdictions.

[8] Additionally, many other cases on related issues have reaffirmed the vitality of *Gardner-Denver* after *Gilmer*, and stressed the distinction between individual and collective agreements for purposes of determining the obligation to arbitrate rather than litigate. *Heurtebise v. Reliable Business Computers, Inc.*, 550 N.W.2d 243,

The collective bargaining agreement in *Austin*, quoted above, is quite unusual in the clarity with which it makes statutory causes of action cognizable under the collective bargaining agreement grievance/arbitration system. As the Tenth Circuit concluded recently in rejecting the *Austin* approach in favor of the "majority view" (*Harrison, supra*, 112 F.3d at 1453-54), in the usual case "[a]n arbitration clause in a collective bargaining agreement . . . implicates only contractual rights under that agreement," (*id.*).

That *Austin* was not the "usual" case almost certainly explains why the Fourth Circuit decided it differently from all the other appellate cases concerning exhaustion of collective bargaining agreement arbitration in employment discrimination cases. The Fourth Circuit itself has not had the opportunity to apply *Austin* to collective bargaining agreement discrimination and grievance/arbitration provisions of the typical kinds. Until the Fourth Circuit or some other federal court of appeals or state high court decides that the arbitration process created by the more usual collective bargaining agreement precludes federal employment discrimination litigation, there will be no conflict on the question petitioner seeks to present worthy of this Court's attention.[9]

248-49 (Mich. 1996); *Winston v. Maine Technical College System*, 631 A.2d 70, 73 n.5 (Me. 1993); *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229, 230 (5th Cir. 1991); *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 308 (6th Cir. 1991); *Bernder v. A.G. Edwards & Sons*, 971 F.2d 698, 700 (11th Cir. 1992).

[9] The only circuit court case of which we are aware involving a somewhat similar agreement to that in *Austin* is one that is presently pending. *See Martin v. Dana Corp.*, 1997 U.S. App. LEXIS 13791 (3rd Cir., June 12, 1997), *vacated and rehearing en banc ordered* July 1, 1997. In *Martin*, a panel of the Third Circuit followed *Austin*, stressing the particular language of the agreement before it and distinguishing the other appellate cases on that basis. If the Third Circuit in its *en banc* review decides not to follow *Austin*, there might be then, as there is not now, a certworthy circuit conflict.

Any such development is exceedingly unlikely. For, under *Gardner-Denver* and the line of related cases extending it and affirming its essential rationale, the result reached by the Seventh Circuit in this case is the only one that can be squared with this Court's precedents. *See e.g. Barrentine v. Arkansas-Best Freight System, supra* (applying *Gardner-Denver* to causes of action under the Fair Labor Standards Act and elaborating on its rationale); *McDonald v. City of West Branch,* 466 U.S. 284 (1984) (applying *Gardner-Denver* and *Barrentine* to causes of action under 42 U.S.C. § 1983); *see also Allis-Chalmers v. Lueck,* 471 U.S. 202, 213 n.8 (1985) (*Gardner-Denver* distinguished NLRA rights, conferred on employees collectively, "which could be waived by contract between the parties" from "an individual's substantive right derived from an independent body of law that could not be avoided by a contractual agreement."); *Atchison, Topeka, & Santa Fe Ry. Co. v. Buell,* 480 U.S. 557, 565 (1987), *citing McDonald, Barrentine,* and *Gardner-Denver* ("This Court has, on numerous occasions, declined to hold that individual employees are, because of the availability of arbitration, barred from bringing claims under federal statutes. . . . [T]he theory running through these cases is that notwithstanding the strong policies encouraging arbitration, 'different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.').

Far from undermining those cases, *Gilmer* specifically reaffirmed them, distinguishing *Gardner-Denver* on the basis, among others, that in *Gardner-Denver* "the employees there had not agreed to arbitrate their statutory claims" and "an important concern therefore was the tension between collective representation and individual statutory rights, a concern not applicable in the present [individual agreement] case." 500 U.S. at 34. And since *Gilmer,* this Court has reiterated that *Gilmer* is *consistent*

with *Gardner-Denver*, and that *Gardner-Denver* remains good law:

> In holding that an agreement to arbitrate an Age Discrimination in Employment Act claim is enforceable under the Federal Arbitration Act, *Gilmer emphasized its basic consistency with our unanimous decision in Gardner-Denver* [citations omitted], permitting a discharged employee to bring a Title VII claim notwithstanding his having already grieved the dismissal under a collective-bargaining agreement. *Gilmer* distinguished *Gardner-Denver* as relying, *inter alia*, on: the 'distinctly separate nature of . . . contractual and statutory rights' (even when both were 'violated as a result of the same factual occurrence') [citations omitted]; the fact that a labor arbitrator has authority to resolve only questions of contractual rights [citations omitted]; and the concern that in collective-bargaining arbitration, 'the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit.'

Livadas v. Bradshaw, supra, 114 S. Ct. at 2081 n.21.

Thus, *Gilmer* and *Livadas* together provide more than adequate guidance to the lower courts. Those cases reaffirm the recognition in *Gardner-Denver* and its progeny that there is an inherent tension between federal labor policy encouraging the collective resolution of terms and conditions of employment through collective bargaining, and the particular federal statutory protection accorded to each individual employee to be free of discrimination. And nothing in *Gilmer* or *Livadas* disturbs the conclusion of *Gardner-Denver* and its progeny that this tension is to be resolved by permitting individual employees to pursue the statutory procedures available to vindicate their individual statutory employment rights, even if there is also a collectively bargained grievance/arbitaration procedure available to them.

CONCLUSION

For the foregoing reasons Tractor's petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated this 15th day of July, 1997.

APPENDIX

APPENDIX

APPENDIX

Articles 12 and 29 of the
Collective Bargaining Agreement between
Tractor Supply Co. and
Chauffeurs, Teamsters, Warehousemen, and Helpers,
Local Union No. 135

ARTICLE 12—GRIEVANCE AND ARBITRATION PROCEDURE

Section 1

A grievance within the meaning of the Article shall be limited to a dispute arising between the parties hereto involving interpretation or application of the provisions of this Agreement. Should a grievance arise it shall be handled in the following manner:

Step 1. The aggrieved associate, will present a grievance to the associate's immediate supervisor within two (2) working days of the occurrence of the complained-of event. If not presented within this period of time, the case cannot be presented at a future date. The Company shall render a decision within two (2) working days of the date of presentation.

Step 2. If not disposed of in Step 1, the associate may present the grievance in writing to the Company. A decision at Step 1 shall be considered to be final and the grievance shall be considered to be withdrawn unless the grievance is taken to Step 2 within three (3) working days of the date of decision at Step 1. The Company shall give this decision within three (3) working days after the grievance is presented to him.

Step 3. If not disposed of in Step 2, the associate and the business representative of the Union may appeal

the grievance by giving written notice thereof to the Company. A decision at Step 2 shall be considered as final unless the notice of appeal to Step 3 is given within five (5) calendar days after the decision. The Company shall render this decision within five (5) calendar days from the date the written grievance is presented at Step 3.

At any step of the grievance procedure, if the appropriate Company representative does not act within the specified period of time, the grievance shall be considered as having been denied as of the conclusion of the applicable time period.

Section 2

Only those issues fulfilling both of the following requirements can be appealed beyond Step 3.

A. The grievance must be based on an alleged violation by the Company of a specific contract provision or must be based on the interpretation or application of a specific provision of the contract. A Company decision will not be subject to reversal unless it is found that the Company misinterpreted or violated the express terms of the contract.

B. The grievance must have been processed through each step of the grievance procedure in a timely manner unless it has been mutually agreed in writing by both parties that a specific step is to be bypassed or time limits waived.

Section 3

If the decision of the Company in Step 3 is unsatisfactory to the Union, and the Union wishes to process the grievance further, the Union must make a written request to the Company within seven (7) calendar days following the Step 3 decision. The written request shall include a specific statement of the violations and the position of

the Union concerning the Union's interpretation of the disputed contract provision along with the specific remedy requested.

Section 4—Arbitration

Appeal of a Step 3 decision shall be subject to arbitration. Matters involving associate grievances shall be brought to formal arbitration only after attempts to resolve the grievance in the steps as outlined in the Grievance Procedure are completed.

Section 5

When the Union invokes the arbitration procedure, the Union will request a panel of arbitrators from the Federal Mediation and Conciliation Service. The FMCS shall send the list of arbitrators to the authorized representatives of the Union and the Company. The arbitrator will be selected from the panel by the parties, alternately striking a name until a single arbitrator is selected. The party to strike the first name shall be determined by the toss of a coin. Either party reserves the right to reject only one list from the FMCS and request another list prior to striking of names. The Arbitrator shall conduct a hearing as expeditiously as is possible and shall render his decision promptly and without undue delay. The decision of the Arbitrator shall be final and binding on both parties.

Section 6

In the course of hearings before the arbitrator, the Company and the Union shall be afforded a full opportunity to present any evidence, written or oral, which may be pertinent to the matter before the arbitrator.

Section 7

Each party shall bear their own expenses. The fees of the arbitrator shall be borne by the losing party. The arbitrator shall only interpret the Agreement and shall not

modify, amend, add to or delete from any of its provisions in deciding the issue(s) submitted to him by the parties as contained in the above grievance procedure.

Section 8

Associates covered by this Agreement cannot, except through the duly constituted officials of the Union, initiate the arbitration procedures set forth in this Article.

Section 9

All grievance and arbitration matters shall be handled at a time other than normal working hours, and shall not interfere with an associate's performance of duties. Time spent by the associates in handling such matters shall be without pay.

Section 10

No associate or Union representative shall in any manner solicit or encourage grievances and disputes. Any grievance or dispute which has been in any way solicited or encouraged shall be null and void, will be reviewed by the Company for such reason, and will not be subject to the grievance and arbitration procedure.

Section 11

The decision of the arbitrator will be final and binding on all parties.

ARTICLE 29—MISCELLANEOUS PROVISIONS

Section 1—Bulletin Boards

The Company agrees to post within the business premises such notices of Union meetings, etc., as may be delivered to it by the Union.

Section 2—No Discrimination

The Company agrees that it will not discriminate against any associate for employment for or on account of his affiliation or activities with the Union. The Company and Union agree not to discriminate against any individual with respect to hiring, compensation, terms or conditions of employment because of an individual's race, color, religion, age, sex, or national origin. Nor will the Company limit, segregate or classify associates in any way to deprive any individual associate of employment opportunities because of race, color, religion, age, sex, veteran or national origin.

Section 3—The Americans With Disabilities Act (ADA)

Due to the Americans with Disabilities Act or the regulations promulgated thereunder, the Company may be required to make a reasonable accommodation to the disability of an applicant or incumbent associate that may be in conflict with provisions of this Agreement. In such event, the Company shall be privileged to make such accommodation notwithstanding the requirements of this Agreement. The Company shall notify the Union thereafter as soon as is practicable of such situation on a confidential basis.